STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,806

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Appeal of)

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INTRODUCTION

The petitioners appeal the decision by the Department of Social and Rehabilitation Services (SRS) finding them ineligible for an ongoing adoption assistance subsidy related to their adoption of a child in 1991. The issue is whether the petitioners' child qualifies retroactively for such assistance.

FINDINGS OF FACT

1. The petitioners' adopted daughter, K., was born on August 8, 1990, the child of unmarried birth parents, the mother being a minor who lived with her own parents. K. never lived with her birth parents but was voluntarily relinquished by them to the Vermont Children's Aid Society (VCAS), a private adoption organization, at the time of her birth. The Probate Court terminated the birth parent's parental rights on September 19, 1990, based upon their voluntary "surrender and relinquishment" of K.

2. Shortly following her birth, K. underwent surgery for repair of a transposition of the great vessels of her heart. For a couple of months, K. was placed with a VCAS foster family while she was medically evaluated. Her features suggested that she might have fetal alcohol syndrome although a history of drinking in the mother could not be confirmed. The medical reports expressed a concern for future health problems but could not yet identify what they might be. No attempt was made by the agency to apply for SSI for K.

3. In November of 1990, K.'s adoption social worker at VCAS wrote seven suitable prospective families with information about K. and her special needs. The petitioners, who describe themselves as "middle class income earners", were the only family to indicate an interest in adopting K. and were approved by the agency for her adoption. If the agency had been unable to find a home for K., she would have been placed in SRS custody because the adoption agency makes no provision for long term foster care. This has happened only one time within memory of the social workers at VCAS who have placed many special needs infants.

4. The petitioners received assistance with the legal costs of the adoption through an SRS sponsored

program but were not informed by anyone at VCAS that they might be eligible for ongoing medical assistance after the adoption because no one at VCAS was aware that such assistance was available to families using private adoption agencies. The petitioners understood that extensive medical costs, including further hospitalizations for additional heart surgery, were likely to be associated with the adoption of K. However, they were willing to proceed with the adoption because of their affection for K. and because they believed that their private health insurance and some Department of Health programs would help to cover her medical expenses. The adoption was finalized in June of 1991.

5. SRS did not notify the private adoption agencies that they would begin taking applications for adoption subsidies for Vermont special needs children who were not in their custody until August 9, 1991. Only recently has VCAS started notifying prospective parents of the existence of ongoing medical subsidies and gathering information to document need for those subsidies.

6. K., who is now five years old, in addition to the serious cardiac condition diagnosed at her birth, has been confirmed as having fetal alcohol syndrome, severe aortic regurgitation and has had a considerable amount of medical intervention, including several major open-heart surgeries since her adoption. She has had feeding, behavioral and developmental difficulties, including attention deficit disorder, speech difficulties, gross motor incoordination and joint hypermobility. Medical reports indicate that the petitioners have obtained appropriate interventions and services needed to help K. live up to her potential and that they have provided her with "exemplary care" and a loving parent-child relationship. The petitioners have incurred about $5,000 in out of pocket expenses for K.'s medical care, representing costs not covered by their health insurance, and have experienced acute financial difficulties meeting the costs of her medical procedures and prescriptions. The Department of Health has picked up some expenses relating to her cardiac surgery.

7. In late 1994, the petitioners learned of the existence of the adoption subsidy program and on May 1, 1995, applied for a post adoption subsidy for K. After consideration of their request, SRS denied it because it was not made before legal finalization of the adoption. However, because SRS was aware that the petitioners had not known about the program when K. was adopted, they also reviewed her eligibility under the program criteria and concluded that K would not have been eligible even if she had applied. This latter decision was made for several reasons: K. was not removed from her home because it was contrary to her best interests; was not living with an ANFC eligible relative; was not determined eligible for SSI; and was able to be placed for adoption without medical assistance even though she had a medical condition which might have made such a placement difficult.

8. The petitioners have tried other ways to get medical assistance for K., including applying for SSI and Medicaid. They have been found to be over income for both programs.

ORDER

SRS's decision is affirmed.

REASONS

The starting point for the legal analysis in this matter is the federal statute that created the adoption assistance program. 42 U.S.C. § 673 includes the following:

Adoption assistance program

(a) Agreements with adoptive parents of children with special needs; State payments; qualifying children; amount of payments; changes in circumstances; placement period prior to adoption; nonrecurring adoption expenses

. . .

(2) . . . a child meets the requirements of this paragraph if such child--

(A)(i) at the time adoption proceedings were initiated, met the requirements of (AFDC eligibility) or would have met such requirements except for his removal from the home of a relative . . . either pursuant to a voluntary placement agreement with respect to which Federal payments are provided . . . or as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child,

(ii) meets all of the requirements of subchapter XVI of this chapter with respect to eligibility for supplemental security income benefits, or

(iii) is a child whose costs in a foster family home or child care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent. . . .

(B)(i) received aid under the State plan (for AFDC) in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or

(ii)(I) would have received such aid in or for such month if application had been made therefor, or (II) had been living with a relative . . . within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made, or

(iii) is a child described in subparagraph (A)(ii) or (A)(iii), and

(C) has been determined by the State, pursuant to subsection (c) of this section, to be a child with special needs.

. . .

(c) Children with special needs

For purposes of this section, a child shall not be considered a child with special needs unless--

(1) the State has determined that the child cannot or should not be returned to the home of his parents; and

(2) the State had first determined (A) that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without

providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter, and (B) that, except where it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as foster child, a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter.

The above criteria can be summarized as requiring that to be eligible for adoption assistance a child must 1) be either ANFC or SSI eligible at the time the adoption proceedings are initiated; 2) be receiving or eligible for ANFC at the time of the adoption assistance agreement or the court proceedings removing the child from the home; and 3) have "special needs"--i.e., cannot return to live with its parents, have a medical or situational handicap, and because of that handicap cannot be placed for adoption without providing adoption assistance payments.

Federal regulations implementing the above provisions further provide:

The adoption assistance agreement for payments pursuant to section 473(a)(2) must meet the requirements of section 475(3) of the Act and must:

(1) Be signed and in effect at the time of or prior to the final decree of adoption. A copy of the signed agreement must be given to each party. . . .

42 C.F.R. § 1356.40 (b).

Part of the intent of above provisions is to minimize ANFC payments to children in, or likely to be in, foster care by providing adoption assistance to encourage the permanent adoption of those children. The petitioners maintain, however, that they should be found eligible for an adoption assistance subsidy at this time because it can now be determined retroactively that their child would have met all the above eligibility factors for adoption assistance had they applied for it at the time. SRS maintains that it is not the intent of the program to provide assistance to adopting parents who, after the adoption takes place, are faced with expenses greater than anticipated. Reluctantly (because of her own sympathy with the petitioners' predicament), the hearing officer concludes that the evidence and the law in this matter clearly support SRS's decision.

The legal analysis need really go no further than the regulation cited above, 42 C.F.R. § 1356.40 (b)(1), which requires that to be eligible for the adoption assistance program an adoption assistance agreement between SRS and the adopting parents "must...be signed and in effect at the time of or prior to the final decree of adoption". There is no question in this matter that the petitioners did not even apply for adoption assistance until more than three years after they had adopted the child. However, the petitioners urge that the Department be estopped from denying them the benefits of a program which they believe they were eligible for based on a breach of the Department's duty to inform them or the private adoption agency of the existence of such a program prior to the finalization of the adoption.

The facts in this case are not particularly well developed[(1)] on this issue of estoppel which implicates issues of duty, notice and reliance. The Department has indicated some sympathy for the parents in this regard by providing them not only with a denial based on timeliness but also with an analysis of their eligibility under the program in the event their application had been timely.

As the estoppel issue is a thorny and poorly developed one, it makes sense in terms of analyzing the petitioner's eligibility herein to look first at whether they would have been eligible under the assistance program if they had applied in a timely manner, before addressing any issues regarding the timeliness of the application. It must be concluded after a review of the criteria, that the petitioners would not have been eligible for the assistance had they applied at the time.

There can be no doubt that K. is a child with "special needs" because she has severe handicaps and could not return to her birth parents because their parental rights had been terminated. However, the statute also requires that K. have been a child who was either eligible for ANFC or SSI at the time of the adoption. The lack of a contemporaneous finding on that issue is particularly problematic since it requires a great deal of speculation as to what the specific facts at issue were and how the Department of Social Welfare or the Social Security Administration might have interpreted those facts with regard to their complex eligibility regulations. Indeed, such an approach was deemed inappropriate by the Board in Fair Hearing No. 13,474, which also involved an untimely adoption assistance application.

However, even if the petitioners could have shown that their child met these eligibility requirements, it still remains for the petitioners to show that K. could not have been placed for adoption without the adoption assistance payments. This requirement is one which is at the heart of the program, for the primary purpose of the program is to provide assistance only for children who would remain in foster homes or on ANFC and SSI without such assistance.

The facts in this matter show that the agency was in fact able to place K. in an adoptive home, the petitioner's home, without any assistance and was able to place her there in a relatively short period of time, about two months after she was relinquished for adoption. The petitioners committed to adopt K. without any expectation that they would get any further help (other than from the Department of Health) with her medical needs and with the full knowledge that she had serious and expensive medical problems and could possibly develop more. Given this situation, it cannot be found that K. met the requirements for a child who was eligible for adoption subsidy payments.

Given K.'s lack of eligibility for such assistance, it is not necessary to determine now whether VCAS or the petitioners should have been allowed to apply for such assistance for K. The fact that K. has a serious medical condition which is expensive to treat is a situation with which the Board can feel and does express a good deal of sympathy. However, the petitioners willingly shouldered this burden when they committed to adopting K., without knowledge of or hope for a subsidy, and must now live and deal with the concomitant problems as must the parents of any disabled child. It is hoped that they can find other programs generally available to parents of disabled children to which they can turn for financial assistance. Unfortunately, this very restricted adoption assistance program is not one of them.

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1. The petitioners who are intelligent and articulate presented a good deal of relevant evidence but were not assisted by legal counsel who might have been able to help them to more fully develop evidence on the estoppel issue.